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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LANELL TRAVON ALEXIS, Defendant and Appellant.	B155130 (Super. Ct. No. VA061362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Espinoza, Judge. Affirmed.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Nora Genelin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Lanell Travon Alexis appeals from a judgment of conviction entered after a jury found him guilty of second degree murder (Pen. Code, §§ 187, subd. (a), 189) and found true the allegations he personally used (*id.*, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)) and discharged (*id.*, § 12022.53, subd. (c)) a firearm, causing the death of the victim (*id.*, § 12022.53, subd. (d)). Following his conviction, the trial court sentenced him to state prison for the term prescribed by law. We affirm the judgment.

FACTS

Defendant and his relatives lived in two duplexes on a property on South Compton Avenue in Los Angeles. There was a one-story duplex at the back of the property. Defendant's grandmother, Doris Rucker (Rucker), and one of her daughters, Ladette Sanchez (Sanchez), lived in one of the units. Another daughter, defendant's mother, Artina Rice (Rice), lived in the other unit with her husband, James Baratta (Baratta).

There was a two-story duplex at the front of the property. Rucker's son, Damion Hernandez, lived in the upstairs unit. Rucker's sister, Shirley May Waters, lived in the downstairs unit. Defendant and his fiancée, Lacisha Parks (Parks), were staying in a room in the downstairs unit.

Larry Williams (Williams) was Rucker's boyfriend. When sober, he was nice and quiet. When intoxicated, on alcohol and/or drugs, he was belligerent and violent. In the first few weeks of August 2000, while intoxicated, Williams physically abused Rucker, who called Rice for assistance. He threw a knife at two of Rice's younger sons, barely missing them. He hit Sanchez, causing Rice to call the police. Early on August 27, Williams threatened to kill Rice's daughter with his knife, when she would not move from the television set. He always carried the knife with him.

At about 10:00 p.m. on August 27, defendant was at Rucker's home cooking his dinner; he did not have cooking facilities in his room. Rucker and Sanchez were at home. Williams arrived, drunk and high on drugs. He sat down and asked defendant to get him a videotape. Defendant told him to wait a minute, because he was cooking. Williams waited a few minutes then said, "You said you was going to get the tape." Defendant explained that he was cooking and Williams would have to wait. Williams began calling defendant derogatory names. Defendant again explained that Williams would have to wait until he finished cooking, but Williams continued the name-calling. Eventually, defendant did some name-calling of his own.

Williams went into the kitchen, grabbed defendant and dragged him into the living room. He began hitting defendant. Rucker asked why he was doing this. He responded with curses. Rucker yelled for Rice, who came over to find Williams on top of defendant, fighting with him. Rice pulled Williams off defendant. Defendant returned to the kitchen, and Williams returned to name-calling and taunting defendant. Rice told him to be quiet.

Rice asked Williams what the fight was about. Williams said he wanted the videotape. Rice yelled for Baratta to get the videotape, hoping this would quiet Williams. Baratta brought the videotape and gave it to Williams, then left.

Williams returned to calling defendant names and taunting him. He then told defendant, "I'm going to kill you." Defendant asked if he really meant that. Williams said that he did. He called defendant a "punk" and said he could not fight. Defendant responded with profanity. Williams got up and pulled his knife from its sheath. He rushed into the kitchen and lunged at defendant. Defendant jumped back to avoid getting stabbed. Rice grabbed Williams's hand. They struggled for possession of the knife, Rice receiving a cut on the wrist in the process. Rice told defendant to leave the home. He did so.

Eventually, Rice got Williams to sit down in the living room. Williams was still holding his knife. Rice then left, and Rucker locked the door after her. Rucker tried to

quiet Williams, who continued cursing and saying that he was going to get defendant one day. Rucker told Williams she did not want to hear any more. She went to her room, leaving Williams in the living room by the front door, with the knife in his hand.

Baratta and Parks were outside. Defendant passed by them on his way to his room, cursing and saying that "he drew on me." When Rice returned to her own home, she told Baratta to go and calm defendant. Defendant came running out of his room, however. He had a gun in his hand. He ran to Rucker's door, then to her window. He slid open the window. Williams was still standing by the front door. Defendant fired two shots, hitting Williams in the chest and groin.

Rucker came out of her bedroom. She saw Williams lying face down on the floor and defendant outside the window, gun in hand. Rucker unlocked the front door and defendant came in. He asked what had happened. Rucker told him that he had shot Williams. Defendant looked terrified and said nothing. He ran from the home.

Williams died of the gunshot wound to the chest. A toxicology report revealed that he had a .18 blood alcohol level as well as phencyclidine (PCP) in his system.

Defense

Defendant testified that he was 24 years old. He had known Williams for 10 years, although Williams had been Rucker's boyfriend for only 3 years.

On August 27, 2000, defendant went to Rucker's home to cook dinner. Williams then arrived. Defendant had seen Williams drinking alcohol earlier that evening. Williams began talking to Rucker. He did not seem to be himself. Williams then asked defendant for the videotape. Defendant asked Williams to give him a few minutes while he finished cooking. Williams asked again for the videotape. Less than a minute later, he asked again, in a raised voice. Defendant again asked for a few minutes.

Williams became belligerent. He stood up, called defendant names and said that if he did not get the videotape, there would be problems. Defendant ignored him and continued cooking. Williams got up and came into the kitchen, swearing and "talking

mean." He swung at defendant's head but missed. Defendant grabbed him and the two of them struggled, moving from the kitchen to the living room. Rucker screamed and went to get Rice. Once Rice arrived, she pulled Williams off defendant. Defendant returned to the kitchen and continued to cook his food. Williams sat down on the couch. A minute later, Williams asked defendant if he was going to get the videotape for him. Defendant told him to wait. Williams began cursing at him and threatened to kill him.

Defendant began walking toward the living room. Williams stood up and came toward defendant. He had a knife and was attempting to stab defendant with it. Defendant jumped back. Rice grabbed Williams's arm and struggled with him.

Defendant stormed out of the home. He was scared and angry. He went to his room, thinking he would be able to cool off. Instead, he got a gun and went back toward Rucker's home. He was in fear for his own life, as well as the lives of Rucker and Rice, whom he believed were still inside with Williams and in danger. As he neared Rucker's home, he heard Williams inside, cursing. He went to the window and slid it open. He looked inside and saw Williams. Williams still had the knife in his hand. He began to approach defendant. Afraid that Williams was going to stab him, defendant fired twice. When Williams fell to the ground, defendant became scared and went inside to check on him. Defendant had not been trying to kill Williams; he did not even know that he hit Williams. He had just wanted to scare him.

CONTENTIONS

I

Defendant contends reversal is compelled, in that the trial court erroneously instructed on and permitted the prosecutor to argue first degree murder. We cannot agree.

II

Defendant further contends reversal is compelled due to prosecutorial misconduct during closing argument which denied him a fair trial. We perceive no prosecutorial misconduct.

III

Defendant asserts the mandatory 25-year-to life enhancement imposed under Penal Code section 12022.53, subdivision (d), violates the state and federal constitutional proscriptions against cruel and unusual punishment. The assertion lacks merit.

DISCUSSION

I

Defendant first argues that he was not provided with adequate notice that the prosecution was seeking a first degree murder conviction. Defendant was charged by information with murder in violation of Penal Code section 187, subdivision (a). The information alleged that defendant killed Williams "unlawfully, and with malice aforethought." The prosecutor, in his opening statement, told the jury he was going to ask them to convict defendant of first degree murder.

Following the presentation of the People's case in chief, the defense made "a motion [for acquittal] under Penal Code section 1118[.1] based on the fact that there's insufficient evidence to support premeditation and deliberation in this case. From all the appearances, this was a result of a sudden quarrel. It was done while the defendant was in the heat of passion, and the People -- that's the People's evidence, actually. They have not presented evidence that there was any premeditation or deliberation on the part of

[defendant]. . . . At least for first degree murder." The trial court could not recall any allegation of premeditation and deliberation in the information, adding, "It seems to the court that this is pled as a second degree murder."

In response, the People moved to amend the information. The prosecutor took the position "that the state of the evidence is that [defendant] had enough time to deliberate and premeditate on the actions that he was about to undertake when he went to go retrieve that gun." The court wanted some authority for allowing the People to amend the information at the conclusion of their case and, in the meantime, denied the defense's section 1118.1 motion.

After both sides rested, the trial court revisited the matter during the discussion of jury instructions. The People stated their "position that we are in a jurisdiction which only requires to give general notice of our intent to proceed on the murder. Count 1 [murder] as alleged is sufficient to put the defendant on notice that we were prosecuting this case under other possible degrees provided by Penal Code section 187 in its general definitive terms. Because of that, I don't think there's any authority that requires us to plead specifically the degrees that we're intending to proceed under in the case. Moreover, the state of the evidence is one that is sufficient to allow us to argue that this murder could have been first or second degree. That's always been our intent from the beginning, and . . . it should come as no surprise to the defense . . . that we were proceeding as a first degree case."

The defense responded that the information was "at best second degree murder. They routinely plead willful, deliberate and premeditative [*sic*] when the D.A.'s office pleads an attempted first degree murder, which distinguishes it from an attempted murder. I believe that the same ruling applies to those pleadings applies to these inasfar [*sic*] as notice." The trial court, however, agreed that the information gave the defense adequate notice that first degree murder was being charged. It agreed to give instructions on both first and second degree murder.

Due process requires that a defendant have adequate notice of the charges against him. (*People v. Silva* (2001) 25 Cal.4th 345, 368; see also *People v. Ortega* (1998) 19 Cal.4th 686, 698.) As a general rule, however, "'[i]n charging a crime divided into degrees . . . , it is not necessary to allege the particular degree, or the facts establishing the degree. The general pleading of the offense will support proof of the higher or lower degree. [Citations.]' [Citations.]" (*Ortega, supra,* at p. 696.) More specifically, "'a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder . . . .'" (*Silva, supra,* at p. 367; accord, *People v. Kipp* (2001) 26 Cal.4th 1100, 1131.)

Here, the information charged murder, without specifying a degree. This was sufficient to put defendant on notice that he could be convicted of first degree murder. (*People v. Silva, supra*, 25 Cal.4th at p. 367; *People v. Ortega, supra*, 19 Cal.4th at p. 696.) Even assuming arguendo that it was not sufficient, "defendant could not have been taken unawares," in that the prosecutor made it clear in his opening statement that he was seeking a conviction of first degree murder. (*Silva, supra*, at p. 368.) Moreover, the record makes it clear that the defense *knew* the prosecution was seeking a first degree murder conviction: the defense moved for acquittal of first degree murder. Hence, there was no insufficiency of notice that the prosecution was seeking a first degree murder conviction.

Defendant argues that, in any event, the trial court erred in instructing the jury on first degree murder, in that the instruction was not supported by the evidence. The trial court has the duty to instruct the jury as to the principles of law relevant to the issues raised by the evidence. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Conversely, it is error to instruct the jury on principles of law inapplicable to the case. (*Ibid.*; *People v. Rollo* (1977) 20 Cal.3d 109, 123.)

First degree murder requires a finding the killing was deliberate and premeditated. (*People v. Anderson* (1968) 70 Cal.2d 15, 24.) *People v. Anderson, supra,* 70 Cal.2d 15 sets standards for determining whether the evidence is sufficient to

sustain a finding of deliberation and premeditation. The evidence must show the intent to kill was "'"formed upon a pre-existing reflection,"'" and it was "'the subject of actual deliberation or forethought.'" (At p. 26, italics omitted.) The murder must have been "'"as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, [especially] according to a preconceived design."'" (*Ibid.*, italics omitted.)

However, premeditation and deliberation do not require any specific length of time. "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.'" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated on other grounds at 448 U.S. 903, reiterated on remand 28 Cal.3d 461.)

Here, there was evidence that after the fight with Williams, defendant left Rucker's home and returned to his own room. While doing so, he was cursing and saying that Williams "drew on" him. Once in his room, defendant got his gun. He ran back to Rucker's home, gun in hand. He first ran to Rucker's door, then to her window. He slid open the window. Williams was still standing by the front door. Defendant fired two shots, hitting Williams in the chest and groin.

From this evidence, it is reasonably inferable that defendant was mad at Williams for drawing a knife on him and attacking him. Defendant decided to kill him for doing so. He went to his room and got his gun. He returned to Rucker's home in order to carry out his intended killing. When he could not get in the locked door, he went to the window, slid it up and fired at Williams. At the time, he no longer was in danger from Williams. Neither Rucker nor Rice was in the living room with Williams and in danger from him. In sum, there was evidence of premeditation and deliberation sufficient to support an instruction on first degree murder: defendant decided to kill Williams for

drawing on him and followed through on his plan to do so. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 26.) Accordingly, the trial court did not err in instructing the jury on first degree murder. (*People v. Saddler, supra*, 24 Cal.3d at p. 681; *People v. Rollo, supra,* 20 Cal.3d at pp. 122-123.) It follows that there was no error in allowing the prosecutor to argue first degree murder as well.

II

Defendant claims prosecutorial misconduct during argument, when the prosecutor asked the jurors to put themselves in defendant's position. During opening argument, the prosecutor asked the jury to convict defendant "because he had no self-defense or defense of others. He knew the difference between right and wrong and he could have avoided this. Time and again, he could have turned his cheek and walked the other way. It's difficult, I understand that, and if you put yourself in his shoes, would you shoot, would you kill Mr. Williams." At this point, defendant objected. The trial court overruled the objection.

In closing argument, the prosecutor argued that even though Williams came at defendant with a knife, once defendant left Rucker's home, got a gun and returned, he became the aggressor. The prosecutor added: "I submit to you that if you had been in there with a knife and someone is coming through the window with a gun, who is going to be the victim, who is the aggressor." Defendant objected to the prosecutor "asking the jury to put themselves in the place of the victim." The trial court overruled the objection, explaining, "This is argument."

It is prosecutorial misconduct to use deceptive or reprehensible methods to persuade the jury. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 390.) There may be prosecutorial misconduct even in the absence of intentionality or bad faith. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214; *Sassounian, supra*, at p. 390.) Reversal for prosecutorial misconduct is required if

defendant has been prejudiced thereby—if it is reasonably probable defendant would have obtained a more favorable result absent the misconduct. (*Bolton, supra,* at p. 214; *Sassounian, supra*, at pp. 390-391.) Additionally, the issue of prosecutorial misconduct may not be raised on appeal absent a timely objection and request for admonition below unless the nature of the misconduct was such that an objection and admonition would have been futile to obviate its prejudicial effect. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1056; *People v. Lewis* (1990) 50 Cal.3d 262, 282.)

It is misconduct to ask the jurors to put themselves in the victim's place in order to appeal to the jurors' sympathy or passions. (*People v. Stansbury, supra,* 4 Cal.4th at p. 1057; *People v. Fields* (1983) 35 Cal.3d 329, 362; see also *People v. Kipp*, *supra*, 26 Cal.4th at p. 1130.) Here, the prosecutor made no attempt to appeal to the jurors' sympathy or passions for the victim. Rather, he was attempting to assist them in determining whether it was necessary for defendant to shoot Williams in self-defense. This was not misconduct.

Defendant also argues that the prosecutor misstated the law, telling the jury that it could find defendant guilty of manslaughter if the jurors, in defendant's position, would have killed Williams, rather than telling the jury it could find defendant guilty of manslaughter if he had the requisite mental state. The law is, defendant claims, that the jury was required to determine whether *he* "was overwrought with emotion and actually acted in the heat of passion." Defendant did not object to the prosecutor's statements or request a curative admonition on this basis. Hence, the claim of error is waived. (*People v. Stansbury, supra*, 4 Cal.4th at p. 1056.)

In any event, in determining whether a prosecutor's statements constitute misconduct, we "must view the statements in the context of the argument as a whole. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) We must "'examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief'" of which the defendant complains. (*People v. Ayala* (2000) 24 Cal.4th

243, 288.) In doing so, we do not infer lightly that the jury gave the prosecutor's remarks the most damaging interpretation possible. (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

The prosecutor's statements clearly were addressed to the question whether defendant acted in self-defense, not whether he acted in the heat of passion. We hold there is no reasonable likelihood the jury interpreted the prosecutor's statements in the manner claimed by defendant. Accordingly, there was no misconduct. (*People v. Ayala, supra*, 24 Cal.4th at p. 288.)

III

Defendant was sentenced to prison for a term of 40 years to life. He received 15 years to life for the second degree murder conviction. He received an additional 25 years to life pursuant to Penal Code section 12022.53, subdivisions (c) and (d).[1] This section provides mandatory enhancements for the discharge of a firearm in the commission of specified offenses.

The constitutionality of Penal Code section 12022.53 previously has been challenged and upheld. In *People v. Martinez* (1999) 76 Cal.App.4th 489, review denied February 23, 2000, the court noted that the United States Supreme Court has suggested that "a legislatively mandated sentence" may be held unconstitutional under the Eighth Amendment, "but only in cases of 'extreme sentences that are "grossly disproportionate" to the crime."'" (At p. 494, quoting from *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) The California Supreme Court has held that "[u]nder the California Constitution,

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[1] Subdivision (c) of Penal Code section 12022.53 provides that a person convicted of a specified felony, including murder, "who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison." Subdivision (d) provides that if the discharge of the firearm caused great bodily injury or "death, to any person other than an accomplice, [the person] shall be punished by a term of imprisonment of 25 years to life in the state prison."

a sentence may be cruel or unusual if it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*Martinez, supra*, at p. 494, quoting from *In re Lynch* (1972) 8 Cal.3d 410, 424.)

In determining whether a sentence constitutes cruel or unusual punishment, we consider the natures of the offense and the offender. (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494.) "The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) However, this "inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases should a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*Ibid.*)

Turning to Penal Code section 12022.53, the *Martinez* court noted that the statute, "as a whole represents a careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes. The section is limited, in the first place, to convictions of certain very serious felonies. The statute then sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies: 10 years if the defendant merely used a firearm, 20 years if the defendant personally and intentionally discharged it, and 25 years to life if the defendant's intentional discharge of the firearm proximately caused great bodily injury." (*People v. Martinez*, *supra*, 76 Cal.App.4th at p. 495, fn. omitted.) Thus, the statute "recognize[s] different gradations of culpability" and punishes accordingly. (*Ibid.*) It therefore is not cruel or unusual in the abstract based on a lack of correlation

between the severity of the offense and the length of the punishment. (*Ibid.*; accord, *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214-1215, review den. Jul. 11, 2001.)

Defendant contends the punishment mandated by Penal Code section 12022.53 is excessive when compared to that imposed for the same offense in other jurisdictions. Proportionality analysis also may include comparison with other sentences imposed in other jurisdictions. (*People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1665; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825.) Defendant has the burden of demonstrating that the punishment imposed by section 12022.53 is disproportionate to that imposed for similar offenses in other jurisdictions. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) Defendant reviews statutes imposing enhancements for firearm use from other states. What defendant does not do is review *comparable* statutes, i.e., statutes for use, discharge and causing great bodily injury or death with a firearm during the commission of serious offenses. Section 12022.53 applies only to the most serious crimes. Enhancements for firearm use in the commission of other crimes may be significantly lower. (See Pen. Code, § 12022.5.) Accordingly, defendant has not met his burden of demonstrating the punishments imposed under section 12022.53 are disproportionate when compared to the penalties imposed in other jurisdictions. (*Ayon*, *supra*, at p. 399.)

Defendant also argues the punishment imposed by Penal Code section 12022.53 is disproportionate, in that it is based solely on the choice of weapon; persons committing the same serious offense by other means will receive a significantly shorter term of imprisonment. As noted in *Martinez*, "the Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly that the same crimes committed by other means, in order to deter the use of firearms and save lives.

[Citations.] The distinction drawn by [defendant] does not render section 12022.53 cruel or unusual punishment. [Citation.]" (*People v. Martinez*, *supra,* 76 Cal.App.4th at pp. 497-498.)

Defendant finally argues that the punishment mandated by Penal Code section 12022.53, subdivision (d), is cruel and unusual as applied to him, based on numerous mitigating factors. First, Williams was the initial aggressor and previously had exhibited violent behavior. Next, defendant "was clearly angry and acting in the heat of the passion provoked by Williams." In addition, he was afraid Williams would kill him and/or his mother and/or grandmother. Finally, defendant had no record of violence and was described by witnesses as a peaceful person.

By convicting defendant of second degree murder, the jury rejected defendant's claims that he was acting in the heat of passion and/or in defense of himself, his mother, and/or his grandmother. While Williams was the initial aggressor, defendant was extricated from the situation by his mother and was able to leave his grandmother's home, where Williams remained. Defendant could have called the police or stayed away from his grandmother's home while Williams remained intoxicated. Instead, he went back to his room, got a firearm, returned to his grandmother's home and shot and killed Williams.

At the time of sentencing, defendant was 24 years old. He was a high school graduate. His prior record in California included misdemeanor convictions for theft and disturbing the peace. Defendant admitted a drug-related arrest in New York but refused to provide information about that arrest. He also denied ever using drugs or alcohol. The probation officer noted defendant previously had been placed on probation and had failed to report to his probation officer or pay fees imposed.

The instant case is similar to *Martinez.* In *Martinez*, the defendant got into a dispute with an acquaintance. He left, got a gun, returned and shot the acquaintance. He was convicted of attempted murder. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 492.) The defendant was 23 years old at the time he committed the crime. He had an

insignificant criminal record. He was not known as a violent person. He claimed he had not intended to kill the victim. However, the probation officer noted the seriousness of the crime indicated a callous disregard for the safety of others, justifying the defendant's removal from society for an extended period of time. (*Id*. at pp. 496-497.)

The court observed that "[a]lthough the evidence is uncontradicted that [the defendant] had no significant prior criminal record, this is not determinative. [Citation.] At age 23 [the defendant] was not a minor, and there was no evidence he was unusually immature emotionally or intellectually . . . ." (*People v. Martinez, supra*, 76 Cal.App.4th at p. 497.) The court concluded that, on the record before it, the punishment of 30 years to life[2] was not "grossly disproportionate in light of the nature of the offense and the nature of the offender." (*Ibid.*)

There are no meaningful distinctions between *Martinez* and the instant case. Accordingly, the enhancement imposed on defendant pursuant to Penal Code section 12022.53, subdivision (d), does not constitute cruel or unusual punishment either on its face or as applied to defendant. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 497.)

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J. MALLANO, J.

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[2] The defendant received five years for the attempted murder and a 25-year-to-life enhancement under Penal Code section 12022.53, subdivision (d). (*People v. Martinez, supra,* 76 Cal.App.4th at p. 493.)